No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS MARKLE INTERESTS, LLC; P&F LUMBER COMPANY 2000, LLC; AND PF MONROE PROPERTIES, LLC'S MOTION FOR DIVIDED ORAL ARGUMENT

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INTRODUCTION

Pursuant to Supreme Court Rules 21 and 28.4, Respondents Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC (collectively Family Landowners), respectfully move for divided argument. The Family Landowners request that argument time be divided by allowing 20 minutes for Weyerhaeuser Company's counsel to appear first and 10 minutes for the Family Landowners' counsel to appear second. This division of time will ensure that the Court can test the Family Landowners' unique argument regarding the second question presented, and it also will ensure the parties with the greatest stake in this case have their interests fully represented before the Court. As explained below, Weyerhaeuser treats the second question presented as settled by *Bennett v. Spear*, 520 U.S. 154 (1997). *See* Weyerhaeuser Merits Br. at 46. ("*Bennett* answers the second question presented by our petition."). But, as the Family Landowners have argued, while this Court could rely exclusively on *Bennett* to hold the claim justiciable, Family Landowners' Merits Br. at 49-50, the second question nonetheless presents an important and unsettled question about the scope of judicial review of discretionary agency decisions under the *Heckler* test. *Heckler v. Chaney*, 470 U.S. 821 (1985); *see* Family Landowners Merits Br. at 40-49 (arguing the Court should adopt the test from Justice Scalia's dissent in *Webster v. Doe*, 486 U.S. 592 (1988)).

Respondent Intervenors Center for Biological Diversity and Gulf Restoration Network do not oppose the motion. Federal Respondents U.S. Fish & Wildlife

Service, *et al.* (Service), take no position on the motion. Weyerhaeuser does not consent to the motion.

ARGUMENT

This case addresses the Family Landowners' challenge to the Service's June 12, 2012, designation of 1,544 acres of forested land in St. Tammany Parish, Louisiana, as critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35,118. The Family Landowners and St. Tammany Land Company,[1] which all originally challenged the regulation directly, own 90% of the land at issue; Weyerhaeuser owns the remainder. *See* Pet. App. 88a-89a. The dusky gopher frog does not inhabit the property and the property cannot support the frog without extensive modifications that would cause great economic harm to the Family Landowners. The Service's designation of this Louisiana property is not only bewildering—particularly because almost 5,000 acres of existing critical habitat in Mississippi can actually support the frog—it also violates the Endangered Species Act (ESA) and the Administrative Procedure Act (APA).

Markle Interests, one of the Family Landowners, sued to challenge the critical habitat designation under both the ESA and the APA on February 7, 2013. *See* Pet. App. 88a-89a; Jt. App. JA3. The other Family Landowners and St. Tammany Land Company then filed the same claims against the same defendants on February 26, 2013. *See* Pet. App. 88a-89a. Lastly, Weyerhaeuser followed suit with its own identical claims as well. The latter two cases were consolidated with the first. *See* Pet. App. 89a. The Family

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[1] St. Tammany Land Company is no longer involved in the litigation as a party.

Landowners and the other plaintiffs in the consolidated litigation each filed their own motions for summary judgment in the trial court. On appeal to the Fifth Circuit, the Family Landowners and Weyerhaeuser filed joint briefs. The Fifth Circuit denied relief twice—first over Judge Priscilla Owen's dissent in a 2-1 panel decision and then over a Judge Edith Jones-authored dissent in an 8-6 denial of rehearing en banc.

The Family Landowners filed a petition to this Court which remains pending. *See Markle Interests, LLC v. U.S. Fish & Wildlife Service*, No. 17-74. Weyerhaeuser filed its own petition for writ of certiorari which this Court granted on January 22, 2018. The questions under review are: (1) Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation; and (2) Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

The Court should grant this motion for divided argument between Weyerhaeuser Company and Family Landowners for two reasons. First, the Family Landowners' participation will allow the Court to fully explore the unique argument Family Landowners raise on the second question presented. Weyerhaeuser gives this question short shrift, arguing only that it was resolved by *Bennett v. Spear*, whereas Family Landowners address the complexity of this important issue and urge the Court to adopt the test for judicial review of discretionary agency actions articulated by the late Justice Scalia in *Webster v. Doe*, 486 U.S. at 608 (Scalia, J., dissenting). Second, because the

Family Landowners own the vast majority of the designated property, they bear the bulk of the potential $34 million burden under the challenged regulation; they have the largest stake in the outcome of this case. The Court will benefit from having Family Landowners address the unique arguments they raise on the second question presented, and the Family Landowners should have their interests fully heard and argued by their choice of counsel.

I

THE COURT WILL BENEFIT FROM HEARING THE FAMILY LANDOWNERS' UNIQUE ARGUMENT ON THE SECOND QUESTION PRESENTED

To be sure, "most courts," including this one, "permit time-splitting only in rare cases." *See* Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 148 (Thomson/West 4th ed. 2008). But "[t]he rare case in which time splitting is appropriate arises when each of the two plaintiffs . . . has a claim or a defense that the other one does not share." *Id.* at 149. While the Family Landowners' argument is not exactly a different *claim* or *defense*, in that both Weyerhaeuser and the Family Landowners are similarly situated legally and presented the same claims and defenses below, the Family Landowners' argument set forth in their merits brief raises a distinctive legal theory not advanced by Weyerhaeuser. Thus, argument on this distinct and important point will benefit the parties and allow the Court to test the theory in a full back-and-forth exchange. It benefits the parties because it allows the party advancing the argument to make the argument to the Court, and it relieves Weyerhaeuser's

counsel of any responsibility to advance at oral argument an argument counsel did not make. Accordingly, the logic advanced by Justice Scalia and Garner in *Making Your Case* suggests this is one of the rare situations where splitting time is appropriate.

Only the Family Landowners argue that the Court should recede from the *Heckler v. Chaney* test for judicial reviewability of agency action and instead adopt the test set out by Justice Scalia in *Webster v. Doe*. *See Webster v. Doe*, 486 U.S. at 608 (Scalia, J., dissenting). In *Heckler*, this Court held that agency action "committed to agency discretion by law," as set out in the APA at 5 U.S.C. § 701(a)(2), means that judicial "review is not to be had if the statute [under review] is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. This Court provided little guidance to elaborate upon the "no law to apply" test other than to explain that agency decisions not to criminally prosecute or civilly enforce are beyond judicial review, *id.* at 831-33, and to hold that the "no law to apply" test applies when Congress intends for it to apply. *See Webster*, 486 U.S. at 601.

Justice Scalia rejected that test. He explained that the *Heckler* "no law to apply test" for determining reviewability of agency decisions did not adequately convey what Congress intended when it prohibited judicial review of actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). He saw the error arising in the *Heckler* test's artificial limitation on the court's ability to review an agency decision only if the statute *at issue* offered law to apply for purposes

of judicial review. To Justice Scalia, the language Congress used in § 701(a)(2) demonstrated that the courts were free to look to whether there was *any* law or legal standard to apply to the agency's decision when deciding to review it, not just some law allowing for judicial review in the statute itself. This, according to Justice Scalia, means that there is "no law to apply" *only* if the agency action is the type of decision traditionally held unreviewable by the courts, like actions arising in the political question context, or are protected by sovereign or official immunity, or comprise other areas where courts have traditionally deferred out of respect to the other branches. *Webster*, 486 U.S. at 609. In any other circumstance, the Constitution, the APA, and principles of administrative law provide the *law* to apply in reviewing an agency's exercise of discretion. *See* Family Landowners' Merits Br. at 38-49.

The Family Landowners alone argue that Justice Scalia's formulation is the proper understanding of the "no law to apply" test. Adopting it would align the Court's jurisprudence with *the text* of § 702(a)(2) and this Court's recent precedents confirming that exceptions to judicial review of agency actions are exceedingly narrow. *Sackett v. E.P.A.*, 566 U.S. 120, 129 (2012) (noting "APA's presumption of reviewability for all final agency action"); *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1811 (2016) (same).

The Court should have an opportunity at oral argument to consider—and question—the Family Landowners' counsel regarding this argument. For its part, Weyerhaeuser simply argues that this Court's decision in *Bennett v. Spear* all but settles the

availability of judicial review in this case. Weyerhaeuser accepts the *Heckler* "no law to apply" test, a test that amounts to little more than "a truism." *See* Damien Schiff, *Judicial Review Endangered: Decisions Not To Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 ELR 10352, 10359 (2017).

The Family Landowners' unique argument merits careful consideration by this Court, and the request for divided argument should be granted. *See* Scalia & Garner, *supra* at 148-49.

II

THE FAMILY LANDOWNERS' GREATER STAKE IN THIS LITIGATION WARRANTS DIVIDED ARGUMENT

The Family Landowners have for many decades owned the vast majority of the 1,544 acres at issue which they are leasing to Weyerhaeuser until 2043 for timber harvesting. *See* Pet. App. 88a. Weyerhaeuser owns approximately 152 acres of this land. *See id.* Ultimately, the Family Landowners intend to develop their land and already have a plan in place to do so. But as the Service explains in its designation, the restrictions on the use of the land at issue may preclude any development at a cost to the landowners of up to $33.9 million over 20 years. 77 Fed. Reg. 35,141. Because the Family Landowners own most of the land at issue, they will bear the vast majority of the economic burden.

Even if the federal government ultimately decides to allow some development of the land after consultation, the Family Landowners will still suffer severe financial losses as a result of the critical

habitat designation. A critical habitat designation will substantially increase the time and expense of acquiring any federal permit necessary to develop their land and may require large dedications of land in exchange for the right to develop any of the land. Given their large and consequential interest in the outcome of this case, they respectfully request an opportunity to participate in oral argument, to ensure their interests are fully represented.

CONCLUSION

For the foregoing reasons, both Weyerhaeuser's and the Family Landowners' participation in oral argument will materially assist the Court. The Family Landowners therefore request that argument time be divided allotting 20 minutes for Weyerhaeuser Company's counsel to appear first, and 10 minutes for the Family Landowners' counsel to appear second.

DATED: July 6, 2018.

Respectfully submitted,

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